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No. 90-581

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS J. THOMPSON, ET AL.,

Petitioners,

vs.

BRITISH AIRWAYS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT UTA FRENCH AIRLINES IN OPPOSITION

SOL KROLL
Counsel of Record
KROLL & TRACT
Attorneys for Respondent
UTA French Airlines
500 Fifth Avenue
New York, New York 10110
(212) 921-9100

Of Counsel:
DAVID C. KRAUS

QUESTIONS PRESENTED

Whether jurisdiction under Art. 28(1) of the Warsaw Convention can be conferred on UTA where the UTA flight was not regarded by the parties as part of a single operation of undivided transportation.

Whether the UTA flight from Paris to Freetown was regarded by the parties as a part of a single operation of undivided transportation as defined by Article 1(3) of the Warsaw Convention.

PARTIES TO THE PROCEEDING

Petitioners:

Francis J. Thompson
Eleanor J. Thompson
Francis C. Thompson
Eleanor D. Thompson

Respondents:

UTA French Airlines[1]
Trans World Airlines, Inc.

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[1] In compliance with Rule 28.1 of The Supreme Court, UTA French Airlines has the following subsidiaries and affiliates: Aeromartime; UTH; Sodetraf; Air Inter; Societe Polynesienne Des Villages De Vacanes; Revima; CRMA; and UTA Services Tahiti.

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OPINIONS BELOW

The following is the decision of the Court of Appeals filed April 20, 1990.

NOT TO BE PUBLISHED - SEE LOCAL RULE 14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7128 September Term, 1989

C.A. No. 87-03352

Francis J. Thompson, et al.,

Appellants

v. FILED APR 20 1990

British Airways, Inc., et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Buckley, and D.H. Ginsburg, Circuit Judges

JUDGMENT

This case was considered on the record on appeal from the district court and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c).

It is ORDERED and ADJUDGED that the district court's order of April 18, 1989 be remanded in part, and affirmed in part for the reasons stated in the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

MEMORANDUM

A two-stage inquiry is necessary to determine whether the district court had jurisdiction over Thompson's complaint. First, the court must determine whether "treaty jurisdiction" exists under the language of the Warsaw Convention. See Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1104 (D.C. Cir. 1988); 49 Stat. 3000, T>S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502 (1982). The court would appear to have treaty jurisdiction over TWA on the basis of its

being domiciled in the United States. T.S. No. 876 art. 28(1).

The question of treaty jurisdiction over UTA, however, is more problematic. UTA's domicile and principal place of business are in France. Furthermore, since the Flight Interruption Manifest allowing the Thompsons to travel via UTA was issued in London, "the contract [was] made" there, rather than in Washington, D.C. Id. Similarly, the Thompsons' UTA flight was not part of a "single operation" of "undivided transportation." Therefore, their "destination" was Sierra Leone, not Washington, D.C. See In Re Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3, 5 (2d Cir. 1985). Consequently, the district court lacked treaty jurisdiction as to UTA.

Second, the court must determine whether "domestic jurisdiction" is present. Kapar, 85 F.2d at 1104. Thompson's case exclusively "arose under" the Convention, a treaty signed by the United States. See St. Paul Ins. Co. v. Venezuelan Int'l Airways, 807 F.2d 1543, 1546 (11th Cir. 1987). Therefore, the court had jurisdiction under 28 U.S.C. § 1331 (1982), as alleged in Thompson's original complaint, regardless of his ability to satisfy the amount-in-controversy requirements of other jurisdictional statutes. For this reason, we remand this case for consideration of Thompson's breach of contract and negligence claims against TWA, which the court "d[id] not reach." Opinion, at 4.

We affirm, however, the district court's disposition of Thompson's

discrimination and punitive damages claims. Thompson's discrimination allegations are "conclusory and devoid of factual basis," justifying dismissal. See McClure v. Esparza, 556 F. Supp. 569, 571 (E.D. Mo. 1983), aff'd, 732 F.2d 162 (8th Cir.), Cert. denied, 471 U.S. 1052 (1984). Similarly, Thompson alleges no facts indicating that TWA committed predicate "intentional or reckless acts" justifying a punitive damages award. See Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989). Therefore, the question of whether punitive damages may be recovered under the Warsaw Convention need not be reached.

Finally, we conclude that the court did not abuse its discretion in dismissing Thompson's motions to amend his complaint, to compel discovery, and for sanctions.

PROVISIONS OF LAW INVOLVED

Warsaw Convention[2]

Article 1 (3):

> Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

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[2] The Convention for the Unification of Certain Rules Relating to International Carriage by Air, 49 Stat. 3000, T.S. No. 876, 49 USC §1502 note.

Article 28 (1)

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

Article 30 (1)

In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation in so far as the contract deals with that part of the transportation which is performed under his supervision.

STATEMENT OF THE CASE

THE FLIGHTS

On December 11, 1985, Petitioners started on a trip from Washington, D.C. to Freetown, Sierra Leone. Their air tickets were purchased and issued in Washington, D.C. and contained the following itinerary:

1. Washington, D.C. to New York, N.Y. on TWA
2. New York, N.Y to Amsterdam on KLM
3. Amsterdam to Freetown on KLM
4. Freetown to London on British Caledonia
5. London to Washington, D.C. on British Airways.

The Petitioners began their trip with a delay of the TWA flight in Washington, D.C. which caused them to miss their

connecting flight on KLM in New York. As a result, TWA issued a flight interruption manifest placing the Petitioners on TWA flights from New York to London and London to Freetown on December 12, 1985.

The TWA flight to London arrived late causing the petitioners to miss their connecting flight to Freetown and remain in London overnight.

TWA then placed the petitioners on a British Airways flight to Paris on December 14, 1985 where they would connect with a UTA flight to Freetown. Petitioners last saw their baggage in the custody of TWA at Heathrow Airport in London.

When the Petitioners arrived in Paris on December 14, 1985 they discovered that the UTA flight was not scheduled to depart

for Freetown until the next day which required Petitioners to remain overnight in Paris.

Although the Petitioners purchased business class seats for their trip, TWA only booked economy or coach seats when it rerouted the Petitioners on the British Airways and UTA flights.

Apparently TWA rectified the class of travel for the British Airways flight but did nothing or was unable to do anything for the class of travel on the UTA flight.

Upon boarding the UTA flight, Petitioners erroneously assumed they had business class seats and sat in that section and refused to move. Petitioners claim they did not receive any amenities on the UTA flight.

Upon arrival in Freetown Petitioners discovered that their baggage was not on the flight. A baggage loss report was filed and a search was commenced to locate the baggage. UTA provided Petitioners with an interim baggage allowance. On December 19, 1985 after TWA found and expedited the missing baggage to UTA, UTA delivered the baggage to the Petitioners. UTA also had a few damaged pieces of baggage repaired in Freetown.

UTA had no further contact with the Petitioners until approximately 18 months later in May 1987 when UTA received a letter from Petitioners claiming certain items were missing from their luggage. The claim was denied as untimely and unsubstantiated.

DISTRICT COURT ACTION

On December 11, 1987, the Thompsons filed an action in the United States District Court for the District of Columbia under the Warsaw Convention alleging breach of contract, negligence, discrimination, wilful misconduct and punitive damages. The action was commenced against British Airways, KLM, TWA and UTA. The action was later dismissed against British Airways and KLM.

SUMMARY JUDGMENT

In November, 1988 UTA filed a motion for summary judgment on the grounds that:

1. the amount in controversy was less than $10,000

2. the district court lacked subject matter jurisdiction pursuant to Art. 28(1) of the Warsaw Convention

3. there was no evidence of discrimination by UTA

4. there was no evidence of negligence by UTA

5. plaintiffs were contributorily negligent

6. UTA did not breach its contract with plaintiffs

7. UTA was not liable for plaintiffs' lost opportunity.

In March of 1989 UTA and TWA moved to strike plaintiffs' claims for punitive damages and discrimination.

On April 18, 1989, the district court granted UTA's motion for summary judgment and UTA's and TWA's motion to strike plaintiffs' claim for punitive damages and discrimination.

The district court in granting UTA's motion for summary judgment held that plaintiffs failed to meet the $10,000

jurisdictional requirement and that as such the court did not reach the other grounds or arguments submitted by UTA.

The court noted that the parties had agreed that the provisions of the Warsaw Convention were applicable to the case and that the plaintiffs had argued that the defendants were guilty of wilful misconduct as referred to in Art. 25 thereof which precludes the defendants from availing itself of the limitation of liability provisions. The court, however, found that plaintiffs failed to allege any facts which would constitute wilful misconduct especially regarding the baggage claims which under Art. 22 were limited to a maximum amount of $3,374.04.

In striking the claims for punitive damages and discrimination, the court held the Warsaw Convention provides the

exclusive remedy for plaintiffs' claims and that punitive damages are not available thereunder. The court also found that plaintiffs had failed to make out a case for wilful misconduct and discrimination.

THE APPEAL

The plaintiffs appealed the district court's decision arguing that the district court had jurisdiction over TWA and UTA and the dismissal of punitive damage and discrimination claims were in error.

The Court of Appeals, in remanding in part and affirming in part, the district court's decision, addressed the jurisdictional issue in two stages.

The court first considered whether "treaty jurisdiction" under Art. 28(1) of

the Warsaw Convention existed over TWA and UTA.

Art. 28(1) states:

> "(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

In applying the above criteria, the court held that since TWA was domiciled in the U.S., treaty jurisdiction existed over TWA.

With regard to UTA, the court came to the opposite conclusion and held that since UTA was a French corporation and the issuance of the UTA tickets occurred in London with Freetown as the destination,

none of the criteria of Art. 28(1) applied and the court lacked treaty jurisdiction over UTA.

Secondly, the court considered whether "domestic jurisdiction" was present for federal court purposes. The court found that since the case arose exclusively under the Warsaw Convention, (a treaty signed by the U.S.) federal court jurisdiction existed under 28 U.S.C. 1331, (federal question). The Court of Appeals disagreed with the district court's finding that diversity (28 U.S.C. 1332) was the basis for federal court jurisdiction. Upon this reasoning, the court remanded the case for consideration of the breach of contract and negligence claims against TWA which the district court did not reach.

In addition, the Court of Appeals affirmed the district court's dismissal of the discrimination and punitive damage claims on the grounds that the discrimination allegations were conclusory with no basis in fact and that plaintiffs alleged no facts indicating that TWA committed predicate intentional or reckless acts justifying a punitive damages award. Since the court found no basis in fact supporting a punitive damage award, the court did not reach the question as to whether punitive damages may be recovered under the Warsaw Convention.

Plaintiffs' petition for a rehearing was denied June 29, 1990.

SUMMARY OF ARGUMENT

The facts of this case clearly demonstrate that the parties (carriers and passengers) did not regard the UTA flight as part of a single operation of undivided transportation pursuant to the provisions of the Warsaw Convention.

Therefore, UTA was not a successive carrier; the destination was not Washington D.C.; and the district court did not have jurisdiction over UTA under Article 28(1) of the Warsaw Convention.

Petitioners have failed to show that the Court of Appeals decision with respect to UTA is in conflict with the decision of another federal court of appeals or that this case otherwise presents special and important reasons for granting Petitioners Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The Court of Appeals Correctly Held That The District Court Did Not Have Jurisdiction Over UTA Under Article 28(1) of the Warsaw Convention

Plaintiff brought this action under the Warsaw Convention, an international treaty governing international transportation of passengers and property by air carriage, by filing a summons and complaint in the United States District Court for the District of Columbia.

Pursuant to Article 28(1) of the Convention, an action may only be brought before a court in the territory of a High Contracting Party:

1. where the air carrier is domiciled, or

2. where the air carrier has its principal place of business, or

3. where the transportation contract was made, or

4. at the destination of the transportation.

It is undisputed that the first three criteria do not subject UTA to the jurisdiction of the United States District Court for the District of Columbia. UTA is a French airline which is domiciled and has its principal place of business in France, not in Washington, D.C. In addition, the contract for carriage on the UTA flight was made by TWA in London after the TWA flight from New York arrived late causing Petitioners to miss the TWA flight to Freetown. It is clear that the first three criteria do not serve as a basis for U.S. District Court jurisdiction in Washington D.C.

With regard to the fourth condition, it is equally clear, for the reasons set

forth below that Washington, D.C. was not the destination of the UTA flight and therefore also cannot serve as a basis for U.S. District Court jurisdiction over UTA.

The Court of Appeals in affirming the dismissal of the complaint against UTA found that since the UTA flight was not part of a single operation of undivided transportation, Washington, D.C. was not the "destination" for the purposes of jurisdiction under Article 28(1).

Petitioners assert that this decision is in conflict with decisions of other federal courts which have held that in cases of round-trip carriage involving successive carriers, the place of destination is the same as the place where the journey originated. Petitioners' assertion is erroneous as the Court of

Appeals decision is not in conflict with the stated rule of law.

In determining the place of "destination" when more than one carrier is involved the courts look to the definition of transportation by successive air carriers as set forth in Article 1(3) of the Warsaw Convention:

> "Transportation to be performed by several successive air carriers shall be deemed, for the purposes of the convention to be one undivided transportation, if it has been regarded by the parties as a single operation..."

This definition was followed by the court in Petrire v. Spantax, S.A., 756 F.2d 263, 26C (2nd Cir. 1985), wherein it was held that:

> "...when different carriers are involved, the pertinent unit of travel for determining the 'destination' is the 'single operation' of

> undivided transportation as regarded by the parties."

In Petrire, supra, the court found that because the tickets were issued at the same time and place the parties regarded the return trip from New York to Spain as part of a single operation of undivided transportation. Hence, the destination was determined to be Spain and the airline's motion to dismiss for lack of jurisdiction was granted and affirmed:

> "...when the parties have contemplated a single operation of undivided transportation only one destination exists..." In Re Alleged Food Poisoning Incident, March 1984, 770 F.2d 3, 4 (2nd Cir. 1985).

Conversely, if the parties do not regard the flight as part of a single operation of undivided transportation the carrier of that flight is not a "successive carrier" under Article 30(1)

and 1(3) and not subject to Art. 28(1) jurisdiction based on the destination of other flights in the transportation.

Herein lies the flaw to Petitioners' assertion as Petitioners erroneously assume that UTA was found to be a "successive carrier" under the provisions of the Convention. The Court of Appeals made no such finding.

The key question in determining the place of "destination" as well as whether or not a different carrier is considered a successive carrier is the same, i.e., was the UTA flight regarded by the parties as part of a single operation of undivided transportation?

The facts of this case clearly demonstrate that the parties did <u>not</u>

regard the UTA flight as part of a single operation of undivided transportation.

UTA had no dealings with Petitioners in selecting or contracting the UTA flight from Paris to Freetown. This was done by TWA, who unilaterally and without agreement from Petitioners rerouted Petitioners on UTA. The UTA flight was not made part of Petitioners' undivided transportation as evidenced by the fact that UTA was unaware of Petitioners' flight itinerary and class of travel (business class) which apparently caused some confusion when petitioners checked in and boarded the UTA flight to Freetown. Had UTA regarded the flight as part of a single operation it would have known of and provided for business class travel for the Petitioners. TWA merely rerouted the Petitioners on UTA.

In Briscoe v. Compagne Nationale Air France, 290 F. Supp 863 (USDC SDNY 1968) plaintiff purchased a round trip ticket on Air France from New York to Paris to Belgrade with the dates and the flights of the return trip left open. While in Balgrade plaintiff decided to leave when Air France did not have a flight. Air France accommodated plaintiff and changed the ticket to a flight on Yugoslav Airways from Belgrade to Paris with a stop in Munich. Plaintiff was injured in the flight in Munich.

The issue in the case was whether Yugoslav Airways was a "successive carrier" under Art. 30(1). The court held that it was, because the parties agreed and amended the contract of carriage by designating Yugoslav Airways as the carrier from Belgrade to Paris.

The Court also took the position that where one air carrier engages another carrier without the passenger's agreement, to perform part or all of the carriage, there would be no successive carriage, only a substitution. Briscoe, supra, at page 867.

In In Re Air Crash Disasters At Warsaw, Poland, on March 14, 1980, 748 F.2d 94 (2nd Cir. 1984) where the issue involved notice to the passenger of the Warsaw limitations of liability, the court found that the passenger did not regard the domestic flight and international flight as a single operation:

> "Under Article 1(3) all parties - the successive carriers as well as the passengers - must regard the domestic and overseas flights as a single operation."

Article 1(3) of the Convention and the decisions cited above clearly require that all parties (carriers and passengers) regard the flight as part of a single operation of undivided transportation in order to establish destination as a basis for jurisdiction under Article 28(1).

Clearly, the UTA flight was not regarded by the parties as part of a single operation of undivided transportation. It therefore follows that UTA was not a "successive carrier" under Article 30(1) and Washington D.C. was not the "destination" with respect to UTA.

CONCLUSION

Petitioners have failed to set forth special and important reasons as to why their writ of certiorari should be granted. They have not demonstrated that the Court of Appeals decision, with respect to UTA, is in conflict with the decision of another federal court of appeals or state court of last resort. Further, they have not demonstrated that the Parties regarded the UTA flight as part of a single operation of undivided transportation or that the Court of Appeals erred in holding that UTA was not subject to jurisdiction in Washington D.C. pursuant to Article 28(1) of the Warsaw Convention.

Accordingly, it is respectfully requested that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

SOL KROLL
Counsel of Record
KROLL & TRACT
500 Fifth Avenue
New York, New York 10110
(212) 921-9100
Attorneys for Respondent
UTA French Airlines

Of Counsel:

DAVID C. KRAUS